FST CV16-6028664-S	: SUPERIOR COURT
KEVIN F. COLLINS ESQ D/B/A LAW OFFICES OF KEVIN F. COLLINS	: JUDICIAL DISTRICT OF STAMFORD/NORWALK
V.	: AT STAMFORD
ODETTA ROGERS A/KA ODETTA ROGERS-CLARKE	: MARCH 27, 2018

MEMORANDUM OF DECISION
RE: PLAINTIFF'S MOTION TO STRIKE (#126)

I. INTRODUCTION

The plaintiff brings this action in three counts to recover attorney's fees for services allegedly rendered to the defendant. The defendant has filed an amended counterclaim sounding in six counts. The first count of the counterclaim, which is not the subject of this motion, sounds in legal malpractice. The plaintiff has moved to strike count two of the counterclaim sounding in breach of contract, count three sounding in breach of contractual duty of good faith and fair dealing, count four sounding in intentional misrepresentation, count five sounding in negligent misrepresentation and count six which alleges that the plaintiff violated the provisions of the Connecticut Unfair Trade Practices Act (CUTPA), C.G.S. section 42-110b et seq.

II. THE MOTION TO STRIKE

"A motion to strike attacks the legal sufficiency of the allegations in a pleading. . . . In reviewing the sufficiency of the allegations in the complaint, courts are to assume the truth of the facts pleaded therein and to determine whether those facts establish a valid cause of action. . . . [I]f facts provable in the complaint will support a cause of action, the Motion to Strike must be denied. . . ." *Kumah* v. *Brown*, 307 Conn. 620, 626 (2013) (Internal quotation marks omitted; internal citations omitted.) "A motion to strike is properly granted if the complaint alleges mere conclusions

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of law that are unsupported by the facts alleged." *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498 (2003) (Internal quotation marks omitted.) "What is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental in determining the sufficiency of an [pleading] challenged by a . . . motion to strike, that all well pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . ." *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 148 Conn. App. 359, 364-365 (2014) (internal quotation marks omitted.)

III. DISCUSSION

A. Count Two – Breach of Contract

In the second count of the amended counterclaim the defendant attempts to allege a claim sounding in breach of contract. The defendant incorporates all of the allegations of the first count sounding in legal malpractice and adds that the legal relationship between the parties constituted a contract and that the plaintiff breached the terms of the contract resulting in damage to the defendant. The incorporated provisions of the first count include allegations that the defendant failed to abide by the defendant's decisions concerning said representation when such decisions were within the parameters prescribed by the law. The defendant alleges that her decisions, which the plaintiff failed to abide, by were: (a) to secure a complete and accurate valuation of the marital estate; (b) to obtain a proper and complete financial analysis of the counterclaim plaintiff's husband's assets before trial; and (c) to verify the husband's income and assets before trial. The incorporated provisions also includes several allegations that the plaintiff breached the applicable standard of care in several ways.

"[I]t is well established that claims may be brought against attorneys sounding in contract or in tort, and that some complaints state a cause of action in both contract and tort. [O]ne cannot

bring an action [under both theories, however] merely by couching a claim that one has breached a standard of care in the language of contract. . . . [T]ort claims cloaked in contractual language are, as a matter of law, not breach of contract claims." *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.,* 311 Conn. 282, 290-291. "Whether a plaintiff's cause of action is one for malpractice [or contract] depends upon the definition of [those terms] and the allegations of the complaint." Id. at 291. The Connecticut Supreme Court has succinctly distinguished the two types of claims as follows. "An action in contract is for the breach of a duty arising out of a contract . . . [whereas] an action in tort is for a breach of duty imposed by law." *Gazo* v. *Stamford,* 255 Conn. 245, 263 (2001). In *Meyers* the Supreme Court upheld the granting of a motion for summary judgment in favor of the defendant attorneys on the contract claim noting that the allegations therein did not refer to the violation of a specific contractual provision. The contract for legal services entered into by the parties in the *Meyers* case required the attorneys to represent the plaintiff therein in connection with her claims.

In reaching a similar result our Appellate Court in the case of *Weiner* v. *Clinton,* 106 Conn. App. 379 (2008) noted that the purported contractual count of a complaint that also contained a legal malpractice count "contain[ed] no allegations that refer to specific actions required by the defendant. . . ." Id. at 385. See also *Caffery* v. *Stillman,* 79 Conn. App. 192 (2003).

In the case at bar it is not that the defendant has failed to allege specific acts of claimed wrongdoing on the part of the plaintiff, but rather that the defendant has failed to allege *specific provisions of the contract* requiring those specific acts. This, in turn, brings us back to the succinct statement in *Gazo,* that the duty for which the defendant seeks to hold the plaintiff liable is one that arises out of law, to wit the duty to use reasonable care, rather than a duty that arises out of a

specific contractual provision.

Accordingly, the court concludes that the alleged wrongdoings are breaches of duties that arise out of law and not out of contractual provisions and the Motion to Strike the second count of the counterclaim must be granted.

B. Count Three – Breach of Contractual Duty of Good Faith and Fair Dealing

In the third count the defendant alleges that the defendant breached the duty of good faith and fair dealing in that the fees he charged for services rendered were excessive, and in fact oppressive in light of the work performed by the plaintiff; and that the plaintiff's refusal to abide by reasonable instructions of the defendant was a violation of one or more rules of professional conduct. The counterclaim then lists specific instructions provided by the defendant which the plaintiff did not follow. The third count must be stricken for two reasons. First because the second count has been stricken and the defendant no longer has a breach of contract claim pending before the court she cannot maintain a claim for breach of the contractual duty of good faith and fair dealing for those claims which are no longer contract claims. A contract claim is a necessary antecedent to a claim for breach of a contractual duty of good faith and fair dealing. *Carford* v. *Empire First & Marine Insurance Company*, 94 Conn. App. 41 (2006). Many of the allegations contained in the second count concern claims that the defendant violated the contractual covenant of good faith and fair dealing because he did not perform certain functions that were the basis of his alleged contractual obligations alleged in the second count. Because this court has held that those obligations are not contractual obligations but obligations imposed by law there can be no claim that the plaintiff breached his contractual obligations of good faith and fair dealing in not performing conduct that he had no contractual obligation to perform in the first place.

The defendant does additionally allege that the plaintiff's billings were excessive and oppressive. These conclusory allegations however are insufficient to sustain a claim for breach of the covenant of good faith and fair dealing.

"[A] majority of trial courts have held [however] that plaintiffs must plead facts that go beyond a simple breach of contract claim and enter into a realm of tortious conduct which is motivated by dishonest or sinister purpose." *Katz* v. *Hartford Financial Services Group, Inc.*, Superior Court, judicial district of Hartford, Docket Number CV11-6020408-S, 212 Conn. supra. LEXIS 1269 (May 11, 2012, Domnarski, J.). This court finds itself in agreement with the majority of trial courts and determines that there were no facts beyond simple legal conclusions pled by the defendant that would support a claim of breach of a contractual covenant of good faith and fair dealing. Accordingly, the second count must also be stricken.

C. Count Four - Intentional Misrepresentation

The plaintiff seeks to strike the fourth count of the counterclaim sounding in intentional misrepresentation claiming that the defendant has failed to allege the essential elements of a claim of intentional misrepresentation. The essential elements for a claim of intentional misrepresentation are "(1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; (4) the other party did so act upon that false representation to his injury." *Barbara Weisman, Trustee* v. *Kaspar*, 223 Conn. 531, 539 (1995). A review of the allegations contained in the fourth count persuade the court that the fourth count does contain allegations that, when broadly read, satisfy the essential elements of the tort of intentional misrepresentation. Including, the allegation that the defendant

represented that his billing reflected a true and accurate billing for services actually provided, and that such representation was knowingly false.

The counterclaim alleges that the plaintiff was aware of their falsity and that the misrepresentations were made to induce the defendant to act upon it and that in fact she did rely upon those statements. Read broadly as the court must at this stage of the proceedings and within the context of a motion to strike the court concludes that the defendant has alleged a count for intentional misrepresentation that must survive this Motion to Strike.

D. Count Five - Negligent Misrepresentation

Similarly, the counterclaim defendant's Motion to Strike the fifth count must similarly be denied. The plaintiff simply reads the allegations of the complaint too narrowly. The plaintiff claims that the defendant has not alleged with any specificity, facts giving rise to a conclusion that she relied to her detriment on the negligent misrepresentation. However, beside the allegations concerning the negligent misrepresentation contained in the fifth count, the incorporated allegations of the fifth count include provisions that the case was settled because the plaintiff was not prepared to go to trial though he had represented that he was so prepared. The settlement of a case by the defendant, based upon her belief that the plaintiff had performed certain functions, is sufficient to constitute the element of reliance required to state a claim for negligent misrepresentation.

Accordingly, the court must conclude that the defendant has alleged facts which if proven would entitle her to relief. The Motion to Strike the Fifth Count must be denied.

E. Count Six - CUTPA

Finally, in the sixth count of the counterclaim the defendant alleges that the plaintiff violated the provisions of the Connecticut Unfair Trade Practices Act C.G.S. § 42-110 et seq. It is

well established that a CUTPA claim will not lie against an attorney for his failure to exercise professional judgment or reasonable competence. Nor will it lie against an attorney if the claim is based on a flawed legal strategy. But, it is equally well established that a CUTPA claim will lie against an attorney if it is otherwise adequate and attacks the attorney's conduct with regard to the entrepreneurial aspects of the practice of law. *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48 (1998).

The allegations of the amended counterclaim include allegations of excessive and offensive billing which by its nature involves the entrepreneurial aspects of the practice of law. To the extent the incorporated allegations of the sixth count assert allegations concerning the plaintiff's professional judgment or the quality of his work they cannot support and do not support a CUTPA count and ultimately will not be the basis for any judgment against the plaintiff arising out of the CUTPA count at trial, even if proven. However, the Motion to Strike attacks the entire sixth count which includes allegations of excessive and offensive billing and allegations that the plaintiff knew his billings were excessive at the time he sent them. The allegations of the sixth count include an allegation that the plaintiff represented that his billing reflected a true and accurate billing for services actually provided, and that the plaintiff knew such representations were false. The court does not agree that, at this stage of the proceedings, the allegations of knowingly false billings can be so easily swept aside. Of course, the counterclaim plaintiff will have the burden of proof of its allegations but that is an issue for another day.

Accordingly the court must deny the Motion to Strike the sixth count.

E. Count Six -The Prayer for Relief

The plaintiff moves to strike the prayer for relief seeking punitive damages or an award of attorney's fees. But the basis for that component of the plaintiff's motion rests on the assumption that the court would strike counts four and six. Since the court did not strike counts four and six the Motion to Strike the prayers for relief must also be denied.

IV. CONCLUSION

For all these reasons the court grants the plaintiff's Motion to Strike the second count and the third count. The court denies the plaintiff's Motion to Strike the fourth, fifth and sixth count of the amended counterclaim as well as the prayer for relief of the amended counterclaim.

GENUARIO, J.

Decision entered in accordance with the foregoing 3/27/18.
Notice sent to: Joseph Anthony Maker; Ryan Ryan Deluca LLP. and Votre & Associates.
on 3/27/18. Meghan Murphy, DCC